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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY MENA,

Defendant and Appellant.

2d Crim. No. B282850
(Super. Ct. Nos. 17CR00115,
1491582)
(Santa Barbara County)

A jury found Andy Mena guilty of felony resisting an executive officer (Pen. Code, § 69, count 1)¹ and misdemeanor vandalism (§ 594, subd. (b)(2)(A), count 2). The trial court found Mena to be in violation of probation on a prior case and sentenced him to three years in prison on that case. In the instant case, the trial court sentenced Mena to a consecutive term of eight months on count 1 and a concurrent term of 180 days on count 2. We affirm.

¹ All statutory references are to the Penal Code.

FACTS

Mena lived in an apartment in Santa Maria with his mother, his sister, Polette, and his brother, Ezequiel. On January 16, 2017, Polette came home from work at 7:00 p.m. Mena was drunk. Polette became angry because he was not supposed to be drinking. She left for the gym at 8:00 p.m. When she returned, Mena was playing loud music. Polette asked him to turn down the music, but he refused. An argument ensued. When Mena became aggressive, Polette went into her room because she was frightened. She heard Mena punch the wall and throw things. She called the police at 11:00 p.m.

Santa Maria Police Officers Rocco Church and Daniel Martinez responded to the call. When they arrived, Mena answered the door. He appeared to be intoxicated. The officers asked him to step outside, and he complied.

Church conducted a patdown search for weapons. When Church moved Mena's hands behind his back, Mena said, "[O]h it's like that." His tone was defiant. Although Church did not find any weapons, he placed Mena in handcuffs for safety reasons.

After the search, Church asked Mena to sit on the staircase. It is more difficult for a person to act aggressively from a seated position than a standing position. Mena refused to sit down. Church told him he needed to "sit the fuck down." Mena did not comply. Officer Martinez, who had been speaking to Polette, came over and told Mena to sit down. Mena asked Martinez what he was going to do about it and grabbed the handrail. Church grabbed Mena's bicep and pant leg in an unsuccessful effort to make him sit. Martinez tried to push Mena by the shoulders into a seated position, but was unsuccessful.

Martinez took out his taser. Mena told him to “go ahead and use it.” Martinez put away his taser and used his baton to pry Mena away from the handrailing. Mena was “flailing about.”

Church pushed Mena to the ground in an attempt to gain control. Mena was on his back kicking his legs up and down. Church had his foot on Mena’s bicep and chest. Martinez was on the lower half of Mena’s body. Mena kicked Martinez in the testicles. Martinez said, “[Y]ou kicked me in the balls.” Mena made a sexual panting sound, laughed, and said, “Oh, yeah, oh yeah, take it like that.”

The officers turned Mena on his stomach so that he could not kick his legs up. Church tried to pin Mena’s legs against a wall, but Mena moved his legs and kicked Church in the groin. Martinez took out his taser and stunned Mena. Martinez threatened to stun him again if he continued kicking. Mena stopped kicking and additional officers arrived at the scene. As the officers were walking Mena to the patrol car, he pushed Church into a bush, causing a scratch on Church’s knee.

DISCUSSION

I

Mena contends the trial court erred in failing to instruct sua sponte on the lesser included offenses of misdemeanor resisting arrest and misdemeanor assault.

Section 69, subdivision (a) provides: “Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty, is punishable by [a fine, imprisonment or in county jail].”

Section 69, subdivision (a) may be violated in two ways: by attempting through the use of threat or violence to deter or prevent an officer from performing his or her duty, or resisting an officer by the use of force or violence in the performance of his or her duty. The first way of violating section 69 does not require the actual use of force or violence. (*People v. Smith* (2013) 57 Cal.4th 232, 240.) Nor does it require that the officer be in the performance of his or her duty at the time the threat is made. (*Ibid.*) The second way requires both. (*Id.* at p. 241.)

A violation of section 148, subdivision (a)(1), misdemeanor resisting, requires “willfully resist[ing] . . . any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment.” The misdemeanor offense may be a lesser included offense of the second way of violating section 69, but not the first way of violating the section. (*People v. Smith, supra*, 57 Cal.4th at p. 241.) Where, however, the accusatory pleading alleges that the defendant violated section 69 both ways, section 148, subdivision (a)(1) is a necessarily lesser included offense. (*Smith*, at pp. 242-243.) Because here the accusatory pleading alleges Mena violated section 69 both ways, the People concede that misdemeanor resisting is a lesser included offense.

Mena points out that mere passive resistance to a police officer can be only a misdemeanor. (Citing *In re Bacon* (1966) 240 Cal.App.2d 34, 53.) He argues the evidence shows his offense contained elements of passive resistance, such as his refusal to sit down.

But to require a sua sponte instruction on a lesser included offense, there must be evidence the defendant only committed the lesser offense and not the greater offense. (*People v. Brown* (2016) 245 Cal.App.4th 140, 153-154.) Here there was no

evidence that Mena only passively resisted the officers. Instead, the uncontradicted evidence is that Mena's resistance included force and violence against the officers. The trial court had no sua sponte duty to instruct on misdemeanor resisting arrest.

For similar reasons, the trial court had no sua sponte duty to instruct on misdemeanor assault. (§ 240.) There was no evidence that Mena only assaulted the officers. Instead, the uncontradicted evidence was that he assaulted the officers in the course of resisting arrest.

Mena's reliance on *People v. Brown*, *supra*, 245 Cal.App.4th 140, is misplaced. In *Brown*, two police officers testified the defendant assaulted them in the course of resisting arrest. But the defendant testified that after initially fleeing the officers, he lay down on the ground, not resisting; when unprovoked, an officer jumped on him and hit him in the head three times. The defendant was convicted of violating section 69. The Court of Appeal reversed, concluding that the trial court erred in failing to instruct sua sponte on the lesser included offense of misdemeanor assault. The court reasoned that the jury could have believed the defendant's testimony that he lay on the ground unresisting. That would have made the arrest unlawful due to the excessive use of force. The jury also could have believed that the defendant reacted unreasonably by assaulting the officers. (*Brown*, at pp. 154-155.)

But, unlike *Brown*, here neither Mena nor anyone else testified that Mena did not resist arrest with force and violence. In addition, here the trial court instructed the jury that the People must prove the officers were lawfully performing their duties, and that an officer is not lawfully performing his or her duty if he or she is using unreasonable or excessive force.

(CALCRIM No. 2670.) Thus, in finding Mena guilty of violating section 69, the jury implicitly rejected Mena's defense that the arrest was unlawful for excessive use of force.

DISPOSITION

The judgment is affirmed.

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GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

James K. Voysey, Judge

Superior Court County of Santa Barbara

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